IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPEAL NO. 4 OF 2003

IN

COMPANY PETITION NO. 63 OF 1998

SABIR RASHID & ORS. .. APPELLANTS.

VS.

B.M. JAIN & SONS CO.

PVT. LTD., & ANR. .. RESPONDENTS.

Shri S.H. Doctor with P. Kabadi i/by Doijode Phatarphekar & Associates for the Appellants.

Mr. K.R. Bulchandani with J.P. Shah i/by Kamal & Co. for respondent no. 1.

Shri V.G. Majumdar i/by C.V. Lad for Respondent No.2.

CORAM : S.U. KAMDAR, J.

DATE : 13th JANUARY, 2005.

ORAL JUDGMENT :

1. The present appeal is filed under section 10F of the Companies Act, 1956 against the order passed by the Company Law Board dated 8.12.2000.

2. In view of the fact that the appellant in the present case is not pressing their substantial challenge to the impugned order in the present appeal, I do not propose to go into the details of various facts. However, few facts which are germane to the present case are briefly enumerated as under :-

3. The company known as Bombay Cable Car Co. Pvt. Ltd., was incorporated with their object to carry on business of transportation of tourists and local citizens on Mono-Bio Cable car system (Rope-Way System). The original share capital was held by the appellants 1 to 4 known as "the Rashid Group" being 30,830 equity shares of Rs. 100/- each i.e. 61.67% of the total issued and paid up capital of the company. In April, 1988 the Pune Municipal Corporation (hereinafter referred to as "PMC") issued a tender for providing a passenger rope-way system within the city limits of Pune between Nehru Stadium and Parvati Hill. The said tender was accepted by the company. On 5.7.1991, the agreement was executed between the company and the said PMC in respect of the said project amounting to Rs. 6.5 crores. It is the case of the appellants herein that in view of the said project entered into, Rashid Group required a financial partner and

accordingly an agreement was executed on 19.6.1993 between the appellant no. 1 to 4 representing Rashid Group and Lokhandwala Group. Under the terms and conditions of the said agreement Lokhandwala group agreed to invest in the company to the extent of Rs.125 lacs to execute and implement the said rope way project and in consideration of the said investment, Lokhandwala Group were allotted 19,170 equity shares of Rs. 100 each sometime in October, 1993. A further finance was brought in by Lokhandwala Group of a sum of Rs. 2,28,200/-. On 10.12.1993, the Rope-Way Project was commenced and the work was undertaken. On 30.1.1994, the PMC issued the stop work notice to the company. On 28.11.1995, an agreement was executed between Rashid Group, Lokhandwala Group and the respondent no. 1 company for bringing in the required funds. It was agreed that the respondent no. 1 shall invest Rs. 160 lacs and in turn will buy over 19,170 equity shares and also pay the loan of Rs. 2,28,200/- of Lokhandwala group. On 28.11.1995 the Board of Directors meeting was held wherein the nominee of respondent no.1 one Mr. Mahendra kumar Jain was inducted on the Board as an Additional Director and the representatives of Lokhandwala Group who had three directors on the same Board vacated the office. On 29.3.1996, in a meeting of the Board of Directors it was recorded in the minutes that M.K. Jain , the nominee of Jain Group failed to bring in

the necessary amount as agreed and promised under the finance agreement. On 17.4.1996, a letter was issued by the company to the said Mr. M.K. Jain inter alia recording the failure on the part of N.K. Jain to bring in agreed finance. There were differences and disputes between the said M.K. Jain and respondent no. 1 in respect of the contribution made by the said M.K. Jain as against his commitment under the finance agreement. On 6.8.1996, the company issued a notice to the Pune Municipal Corporation seeking damages because of the stop work notice issued by the Corporation, thus committing breach of the contract entered into with the respondent company. On 4.9.1996, the Board of Directors decided to convene the 12th Annual General Meeting of the Company. On 30.9.1996, an Annual General Meeting of the Company was held and in accordance with the provisions of the Companies Act. The said Mr. M.K. Jain ceased to be the Director of the company as he was not reelected in the said AGM. In October, 1996 the differences and disputes between the company and the Pune Municipal Corporation were referred to arbitration of the retired Judge of this Court and the former Chief Justice of Karnataka High Court, Mr. Justice M.L. Pendse (retired). On 19.11.1996 in a meeting of the Board of Directors, nominees of Jain group namely Rajendra Kumar Jain and Vinod Kumar Jain were appointed as Additional Directors of the company.

On 28.4.1997, in a Board of Directors meeting once again it was recorded that the Jain Group have failed to make the necessary payment as per their commitment to the company. The dispute between the Jain Group and the Appellant continued in respect of the breach of the terms and conditions of the finance arrangement by and between the parties. Time and again meetings were called of the Board of Directors and even an extra-ordinary General Meeting of the company was called to resolve the dispute pertaining to the differences and disputes between the parties. On the other hand, the arbitration proceedings continued and ultimately on 25.2.1998, the arbitration proceedings were concluded. Ultimately, a notice was issued by the respondent no. 1 on 14.2.1998 making various allegations against the company and the Rashid Group. The said Rashid Group and the said company duly replied to the said allegations. On 31.3.1998, the arbitration award was passed in favour of the company and against the Pune Municipal Corporation for a sum of Rs. 2.97 crores with interest at the rate of 18% per annum from the date of the award till the date of payment. Now, the disputes between Rashid group and Jain group intensified and allegations were levelled against each other. The appellant no. 2 herein ultimately filed a suit being Suit No. 2493 of 1998 in this Court on 18.6.1998. On 22.6.1998, an application for ad-interim relief was made. On

6.7.1998, an application for ad-interim relief was refused. Against the said order, an appeal was preferred on 4.8.1998 which appeal has been admitted. By an order it was provided that Jain group should not represent themselves as directors of the company and if they want to claim any right in the company as directors or otherwise then they should adopt appropriate proceedings in that behalf. The respondent no. 1 in the meantime filed a company petition being Company Petition No. 63 of 1998 alleging oppression and mismanagement. The matter was heard by the Company Law Board from time to time. Hearing was concluded on 17.8.2000. On 8.12.2000, the impugned order has been passed by the Company Law Board. The operative part of the impugned order reads as under :-

> "we direct as follows : As and when the Bombay proceedings are concluded and if the same goes in favour of the Jain Group, the company will purchase the 50% shares held by the Jain Group at a valuation to be done by the statutory auditor of the company. The date of valuation will be 31.3.99 being the proximate date of the petition which was filed in November 1998. Once the shares are purchased by the company, we authorise the company, in terms of Section 402, to reduce the share capital to that extent. Till the

Bombay proceedings are completed and the valuation of the shares is made, the company will keep the amount to be received of the Arbitration award in a bank account and shall not draw any part of it, except towards meeting its expenses in the normal course of business. Since the petitioner has substantial stake in the company, one of the representatives of the Jain Group will be invited for all Board meetings of the company to which due notices by registered post should be given at least 7 days before the meeting and he will be entitled to copies of all the Board minutes. The petitioner will be given notices for all ensuing general body meetings, by registered post ack.due.

16. With the above directions we dispose of this petition. NO order as to cost."

4. The order impugned in appeal is made operative subject to the final disposal of the suit which is pending in this Court being Suit No. 2493 of 1998. Since the said operative part of the appeal is subject to the final disposal of the suit by this Court, it is necessary to set out the prayers of the said suit which are as under :-

a) that the Defendant NO. 1 be ordered and decreed to specifically perform its obligation under clause 20 of the Finance Agreement dated 20th November, 1995 and relinquish their share holding in the capital of Defendant No. 1 in favour of the Plaintiff as a nominee of the Rashid group unconditionally.

b) that Defendant Nos. 1 and 5 to 9 be restrained by an order and permanent injunction of this Hon'ble court from in any manner interfering with the management of Defendant No. 2 Company and/or representing themselves as shareholders of Defendant No. 2 Company;

c) that Defendant Nos. 5 to 8 be restrained by an order and permanent injunction of this Hon'ble Court from in any manner representing themselves as Directors of Defendant No.2 Company and from interfering with the management of Defendant No.2 Company;

d) that it be declared that the meetings purportedly held by Defendant Nos. 1 and 5 to 9 to transact any business relating to Defendant No.2 Company were

illegal and therefore void and the resolutions passed in such meetings are also void ab initio and did not have any effect.

e) that Defendant Nos. 5, 8 and 9 be ordered and directed by this Hon'ble Court to forthwith hand over to Defendant No. 2 Company share certificate Nos. 5, 6 and 14 wrongfully held by them in the capital of Defendant NO. 2 Company;

f) that pending the hearing and final disposal of the Suit, the Court Receiver, High Court, Bombay, be appointed as Receiver of 19,170 shares held by Defendant No. 1 in Defendant No.2 Company listed in Exhibit - "V" hereto, with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908 and appoint the Plaintiff as agent of the Court Receiver or direct the Receiver to act in accordance with the instructions of the Plaintiff as the representative of Rashid group;

g) that pending the hearing and final disposal of the Suit, Defendant Nos. 1 and 5 to 9 be restrained by an order and injunction of this Hon'ble Court from in any manner representing themselves as

shareholders of Defendant No.2 Company and/or interfering with the management of Defendant No.2 Company.

h) that pending the hearing and final disposal of the suit, Defendant Nos. 5 to 9 be restrained by an Order and injunction of this Hon'ble Court from in any manner representing themselves as Directors of Defendant No. 2 Company and/or holding any meetings to transact any business of Defendant No. 2 Company;

i) that pending the hearing and final disposal of the Suit, Defendant No. 2 be directed by an order and injunction by this Hon'ble Court to open a separate Bank Account and deposit the dividends declared by Defendant No.2 against the said 19,170 shares held by Defendant No.1 in the capital of Defendant No. 2 Company;

j) that pending the hearing and final disposal of the Suit, Defendant No. 5 be restrained by an order and injunction of this Hon'ble Court to forthwith deposit all the letter heads of Defendant No. 2 Company which are in his possession;

k) for ad-interim reliefs in terms of prayers (f) to (j);

m) for the costs of and incidental to the suit;

n) for such further and other reliefs as the nature and circumstances of the case may require."

5. The learned counsel for the appellants has submitted that he does not desire to press the said appeal. He further submitted that he is willing to accept the order passed by the Company Law Board which is impugned in the present appeal. He however submitted that the said order must be operative. He further submitted that in view of the fact that the said order is made operative subject to the decision in the suit he is not even inclined to press the said suit. He, however, submitted that at the present juncture he is willing to withdraw the said suit in so far as prayer clause (a) of the suit is concerned. According to him, once prayer clause (a) of the suit is not pressed and given up, the order of the Company Law Board must operate automatically. The learned counsel for the appellant has submitted that the order impugned provides for transfer of the shares from the Jain Group in favour of the Rashid

Group. The order further provides that the said shares have to be evaluated by the statutory auditor of the company by taking into consideration the assets of the company as on 31.3.1999. According to the learned counsel for the appellant, under the order impugned the shares are ultimately required to be transferred by the Jain Group to the appellant herein, The learned counsel for the petitioner contended that this is one of the known methods for resolving the disputes between warring shareholders in a company wherein the shareholding of one group is directed to be purchased over by another group to resolve the disputes once and for all in respect of that company. He has also contended that the respondents having not challenged the order of the Company Law Board dated 8.12.2000, they are not entitled to resist the implementation thereof.

6. The learned counsel for the appellant has filed a written undertaking in this Court today which reads as under :-

> "The Appellant no. 2 undertakes to this Hon'ble Court not to press prayer (a) of the High Court OOCJ Suit No. 2493 of 1988 in view of the fact that neither party has challenged the Order of the Company Law Board dated 8th December, 2000 to the extent that it provides that (a) as and when the

Bombay proceedings (i.e. HC OOCJ Suit No. 2493 of 1998 Dishad Sabbir Rashid vs. B.M. Jain & Sons Co. Pvt. Ltd., and Others) are concluded and the same goes in favour of the Jain group, the company (i.e. The Bombay Cable Car Co. Pvt. Ltd.) will purchase 50% shares held by the Jain group at a valuation to be done by the statutory auditor of the company and (b) the date of valuation to be 31st March, 1999."

7. The learned counsel for the appellant has also submitted before me now that as and when the shares are transferred in favour of the appellants herein from the Jain Group in pursuance of the impugned order of the Company Law Board, the Appellant shall not press the remaining prayers in the said suit as the same will become infructuous since the transfer of the management of the company will vest in Rashid Group once the shares are transferred by Jain group in their favour. Thus, in effect the appellant submits that the order impugned be implemented and does not press any challenged to the said order.

8. On the other hand, the learned counsel for the respondent has resisted the said attempt on the part of the respondent to implement the order of the Company Law Board impugned in the present appeal.

The learned counsel for the respondent submits that the order is subject to the final disposal of the suit and, therefore, the order should not be made implementable till and until the suit is finally disposed off and the course which has sought to be suggested by the appellant by giving up prayer (a) of the said suit should not be accepted by this Court. It has been further contended by the learned counsel for the respondent that the appeal should be dismissed by this Court even if the same is not pressed by the appellant because it does not raise any substantial question of law which is necessary as a condition precedent for exercising jurisdiction under section 10F of the Companies Act, 1956. The learned counsel for the respondent thereafter contended that in fact if the order impugned in the appeal is allowed to be implemented by accepting the undertaking given by the appellant herein then in that event, the said order is likely to prejudicially affect the interest of the respondent for two reasons. Firstly, because the order provides for a valuation of the assets by a statutory auditor and that the statutory auditor of the company is a man of the appellant herein. He would not do justice in appropriate valuation of the shares which is required under the order passed by the Company Law Board and which is impugned herein in the present appeal. Secondly, it has been contended that the order impugned provides for

31.3.99 as a cut-off date for evaluating the shares of the respondent company which is sold by the respondent herein. It has been contended that if the dated of 31.3.99 is taken into consideration, then in that event, the only assets of the company which is the award passed by the Arbitrator in an arbitration proceeding against the Pune Municipal Corporation would not be taken into consideration and thus, the appellant and respondent will not get its just dues of the shares which are held by them. It is because according to the respondent the only assets of the company being an award passed by the Arbitrator in favour of the company would be excluded while valuating the shares of the company. In that event, the company will be with no assets. The learned counsel for the appellant contends that the cut off date should be either altered or it should be clarified that the award of the arbitrator would be taken into consideration while evaluating the shares by the statutory auditors in accordance with the order passed by the Company Law Board.

9. Firstly, dealing with the contention of the learned counsel for the respondent that the present appeal should be dismissed as it does not raise any substantial questions of law as required under section 10F of the Companies Act, 1956, I am of the opinion that in fact the said issue is not required to be gone into in the present case. Firstly, it is

because the appellants themselves are not pressing the present appeal. Once the present appeal is not pressed the question of going into the maintainability of the appeal on the ground whether it raises substantial question of law or not does not and cannot arise. However, the learned counsel for the respondent insisted upon arguing the aforesaid point of law and has inter alia relied upon the following judgments :- (1) Maharashtra Power Development Corporation Ltd., vs. Dabhol Power Co., in Company Petition No. 45 of 2002. (2) Minoo H. Modi vs. Hemant D. Vakil reported in 1994 MLJ 78. (3) Malleswara Finance & Investment Co. Pvt. Ltd., vs. Company Law Board, reported in (1995) 1 CLJ 1. He has also contended that under Section 10F of the Companies Act, a finding of fact cannot be interfered with by this Court and in support of the aforesaid proposition of law he also relied upon the judgment of the Apex Court in the case of Kilpest Pvt. Ltd., vs. Shekhar Mehra, reported in (1996) 10 SCC 696 and the judgment of this Court in the case of Shri Anupar Chemicals (India) Pvt. Ltd., vs. Dipak G. Mehta, reported in AIR 1999 Bom. 349.

10. As I have already held that in view of the fact that the appellants are not pressing their appeal, it is not permissible for me to go into the academic question of law whether in the present case

the substantial question of law is raised or not. In that view of the matter, I refrain myself from going into the aforesaid question of law as in my view the same does not arise in the present case for consideration. In the present case, the appellants are seeking dismissal of appeal on the ground that they are not interested in prosecuting the same. The only prayer of the appellant is that the order impugned herein must be made operative and implementable. The respondents have not challenged the said order. Thus, I am of the opinion that it is not permissible for me to refuse to permit implementation of the order which is not anymore under challenge by either of the parties.

11. The learned counsel for the respondents has contended that the said impugned order is subject to the final outcome of the suit and the suit is still pending and not yet disposed of. It is therefore contended by the learned counsel for the respondents that the order which is impugned in the present appeal is not implementable till the hearing and final disposal of the suit. I am of the opinion that the said contention has no merits. In so far as the suit is concerned, the prayers are already set out hereinabove. The prayer (a) which is the most relevant prayer for the purpose of transfer of the shares is being given up by the appellant by an undertaking filed in this Court and recorded

hereinabove. Once the prayer (a) is given up then there is no hindrance or obstacle in implementing the order of the Company Law Board in so far as the transfer of the shares is concerned.

12. In my opinion, the order of the Company Law Board in effect seeks to resolve the dispute finally by and between the parties by effecting the transfer of the shares of the Jain Group in favour of the Rashid Group. Once the said shares are transferred the respondents will no more be the directors of the company bringing to an end the entire dispute including that of the management of the company by and between the parties. The learned counsel for the respondent contends that it is not only prayer (a) which should be given up pressed by the appellant herein but the whole of the suit should not be pressed. I have perused the prayers. Prayer (b) onwards pertains to the management and affairs of the company, particularly acting of the Jain Group as the Directors in the said company. It is undoubtedly true that there is an interim order operating against the Jain Group from acting as directors or representing themselves as directors in the said company. The said order would undoubtedly operate even if prayer (a) is given up. In my opinion, the continuation of the said order could not come in the way of implementing the order passed by the Company Law Board. The Company Law Board

resolves the disputes finally by effecting the transfer of the shares from the respondent in favour of the appellant herein. The appellants are accepting the said order as if the suit is decided in favour of the respondent and against the appellant. By giving up prayer (a) of the said suit, in effect the suit is dismissed of the appellant herein in favour of the respondent. The order of the Company Law Board provides that if the said suit is decided in favour of the respondent herein then the shares of the Jain Group should be transferred in favour of Rashid Group. Once prayer (a) is given up, for all practical purposes the order of the Company Law Board becomes operative in favour of the respondents herein. Thus, in my view, there is nothing wrong in permitting the appellant to withdraw the appeal and/or dismiss the same as not pressed at the same time directing the order to be implemented against the appellants subject to undertaking to give up prayer (a) as mentioned hereinabove. I also further record the further undertaking of the appellant that as and when transfer of shares takes place as per the impugned order the appellant will also withdraw the said suit as the same becomes ultimately infructuous as the prayers pertains to the preventing of interference with the management by the respondent in the said company and/or injuncting the respondent from representing as directors of the said company can

not survive. In the aforesaid position, I am of the opinion that the contention of the respondent that the appeal should be dismissed and the order should not be implemented till and until the disposal of the suit is unsustainable and cannot be accepted. A litigation between the parties must come to an end and once the Company Law Board has taken a recourse to the final resolution of the issue by providing for valuation and transfer of the shares then the same should be operated upon and given effect to. The contention of the learned counsel for the respondent that the said impugned order should not be given effect, inspite of the fact that the same is not challenged by them and then accepted, has to be rejected. In light of the aforesaid fact both the contentions of the learned counsel for the respondent that the appeal should be dismissed as not maintainable since it does not raise substantial question of law under section 10 F of the Companies Act, 1956 as well as the contention that till the disposal of the suit the impugned order passed by the Company Law Board should not be implemented cannot be accepted and I reject the same.

13. This leads me to the next two contentions raised by the learned counsel for the respondent that is that the date of 31.12.1999 given by the Company Law Board is erroneous and incorrect and if the said date is taken into consideration then

obviously the only assets of the company being the award passed by the learned Arbitrator would not be taken into consideration for the valuation of the shares. The second contention raised that the statutory auditor is not likely to give justice because he is the man of the appellant since the appellants are in the management of the company and, therefore, the said statutory auditor should be removed and some other independent person should be appointed as the valuer of the said shares. In so far as these two contentions are concerned, the same are required to be rejected outright simply on the ground that the respondents have not challenged the order passed by the Company Law Board which is impugned herein. Once the respondent have accepted the order and not challenged the same, it is not open for the respondent to contend that the order should be modified as the same is likely to prejudicially affect the rights of the respondent herein. It is settled law that if the person is aggrieved by any order passed, then, he must prefer an appeal against the same and failure to do so would tantamount to acceptance of the order and he cannot be permitted to challenge the same in a proceedings which is initiated by the other side. However, inspite of the aforesaid position of law with a view to bring an end to the entire dispute I put it to the appellant herein that whether they will be agreeable to change the valuer in place of

statutory auditor any other independent chartered accountant named by the Court. The appellant agreed to the same. The respondent took time to consult the client and on the next date I was informed that the respondents are not accepting the said suggestion offered by the client of changing the valuer in place of the said statutory auditor of the company. In so far as the next contention of the respondent pertaining to the assets of the company is concerned and whether the award is included in the assets of the company I offered to the respondent that they can raise the said issue before the valuer while the valuation process is undertaken. If they do not agree with the decision of the valuer then it will be open for them to challenge the same in accordance with law. However, even the said suggestion is rejected by the learned counsel for the respondent herein after taking instructions from their client. In the aforesaid circumstances, it is not possible to alter the impugned order passed by the Company law Board at the instance of the respondent who has not challenged the same.

14. In the aforesaid circumstances, I do not see any merit in the contention of the respondent herein and I reject the same. I, therefore, pass the following order :-

(i) Appeal No. 4 of 2003 is dismissed as not pressed by the appellants herein.

(ii) The undertaking given by the appellants in respect of prayer (a) of the suit being Suit No. 2493 of 1988 is accepted and the said suit is dismissed as against the respondent herein in so far as prayer (a) is concerned.

(iii) The impugned order of the Company Law Board dated 8.12.2000 is confirmed and the statutory auditor will commence the task of valuation of the shares in accordance with the directions given by the Company Law Board in the impugned order.

(iv) On valuation being completed and shares are ultimately transferred in favour of the appellants in accordance with the order passed by the Company Law Board which is impugned herein, the undertaking of the appellant to withdraw the said suit for balance of the prayers will become operative. The said undertaking is also accepted.

15. The present company Appeal No. 4 of 2003 is

disposed of accordingly.

16. However, there shall be no order as to costs.